R Sivabalan a/l A Ramiah v Neoh Lay Cheng (Malaysian Bar Council, intervener)

HIGH COURT (PENANG) — ORIGINATING SUMMONS NO 17D-2–05 OF 2015
COLLIN SEQUERAH JC
1 APRIL 2016

Legal Profession — Professional discipline — Misconduct — Appeal against decision of disciplinary board ('DB') — Whether DB exceeded its jurisdiction — Whether DB preferred fresh charges against appellant that were not the subject of original complaint — Whether DB gone over its quasi-judicial function — Whether DB acted ultra vires — Whether DB's actions exposed appellant to double jeopardy — Whether DB acted in breach of rules of natural justice

The appellant was at all material times an advocate and solicitor in the legal firm of Messrs R Sharmini Siva Ramiah & Co, whilst the respondent was the complainant who lodged a complaint against the appellant with the Malaysian Bar Council. The appellant had acted for the vendor in a sale and purchase transaction between the respondent and the vendor. It was the respondent's complaint that despite having paid the full purchase price of RM45,000 to the vendor through the appellant, there was no transfer of ownership effected of the land after two years. When the respondent did not get the land assured, she had approached the appellant for a return of the purchase price but he had informed her that the RM45,000 had been paid to the vendor. The respondent, who concluded that the appellant had 'colluded with the vendor to cheat and to procure profit' from the sale and purchase transaction, thus lodged a complaint against the appellant. The complaint for cheating and colluding to procure profit was referred to the disciplinary committee ('the DC'). The DC found there was no misconduct on the part of the appellant. However, the disciplinary board ('the DB') disagreed with the findings of the DC and issued a notice to the appellant to make his representation before the DB. After considering the appellant's submissions, the DB found the appellant guilty for conduct unbefitting of an advocate and solicitor when he failed to ensure that the title in the land passed to the respondent before releasing the purchase price to his client, the vendor. The DB thus fined the appellant RM10,000. This was the appellant's appeal against the DB's order. The appellant submitted that the DB had gone over and above its quasi-judicial function when it disregarded the original complaint and charge by the Malaysian Bar Council, namely 'cheating and colluding', and on its own volition found the appellant guilty on a wholly different charge altogether ie 'failing to ensure that title passes to the complainant'. The appellant further submitted that he had not been presented

with the opportunity to explain the situation fully in relation to the new charge laid against him.

Held, allowing the appeal with no order as to costs:

(1) It was evident that the two charges levelled against the appellant were totally different in nature from each other. It was also clear that the DB should only deal with complaints in accordance with such rules as prescribed and could not arrogate to itself powers it did not have. If the DB had felt that the findings of the DC was lacking in detail, it was open for it to request the DC to submit more detailed findings. However, the DB overstepped its boundaries when it took upon itself the task of effectively preferring fresh charges against the appellant, which were not the subject of the original complaint. It had therefore acted ultra vires its powers and on this ground alone, this appeal ought to be allowed (see paras 46, 48 & 52).

(2) The action of the DB after the DC had found no case against the appellant was also akin to the infringement of the rule that no man should be prosecuted twice for the same offence. Although it could be argued that this rule ought not to apply because the DB had preferred fresh charges, this argument would tend to ignore the inherent underlying philosophy that no one ought not to be tried again upon the same set of facts or suffer double jeopardy (see paras 53–54).

(3) It was beyond dispute that the proceedings conducted before the DB were quasi-judicial in nature and that being quasi-judicial in nature, the DB was obliged to observe the dictates of natural justice. However, the DB had failed to adhere to the dictates of natural justice when it failed to inform the appellant of the amended charge of 'failing to ensure that title passes to the complainant', which was necessary to enable the appellant to properly defend and meet the case alleged against him (see paras 2 & 5).

[Bahasa Malaysia summary

Perayu, pada semua masa yang material, ialah seorang peguam bela dan peguam cara di firma Tetuan R Sharmini Siva Ramiah & Co, manakala responden pula merupakan pengadu yang mengemukakan aduan terhadap perayu kepada Majlis Peguam Malaysia. Perayu telah bertindak mewakili penjual dalam suatu transaksi jual beli antara pihak responden dengan penjual. Responden telah mengadu bahawa walaupun harga belian sebanyak RM45,000 telah dibayar secara penuh kepada penjual melalui perayu, tiada pindah milik tanah dibuat selepas dua tahun. Apabila pihak responden tidak mendapat tanah yang dijanjikan, responden telah meminta daripada perayu pemulangan semula harga belian yang telah dibayar tetapi responden telah dimaklumkan bahawa wang RM45,000 itu telahpun dibayar kepada penjual. Pihak responden, yang telah membuat kesimpulan bahawa perayu telah

membuat pakatan sulit dengan penjual untuk menipunya dan untuk mendapatkan keuntungan daripada transaksi jual beli itu, telah mengemukakan aduan terhadap perayu. Aduan mengenai penipuan dan berpakat sulit bagi mendapatkan keuntungan itu telah dirujuk kepada jawatankuasa disiplin ('JD). Pihak JD mendapati tidak terdapat apa-apa salah laku pada pihak perayu. Walau bagaimanapun, lembaga disiplin ('LD') tidak bersetuju dengan dapatan JD itu dan mengeluarkan notis kepada perayu untuk hadir di hadapan LD. Setelah mempertimbangkan hujahan perayu, pihak LD mendapati bahawa perayu bersalah melakukan suatu perbuatan yang tidak layak bagi seorang peguam bela dan peguam cara apabila perayu gagal untuk memastikan bahawa hakmilik tanah dipindahkan kepada responden sebelum menyerahkan harga belian itu kepada pelanggannya, iaitu penjual. Pihak LD kemudiannya telah mendenda perayu sebanyak RM10,000. Rayuan ini merupakan rayuan perayu terhadap perintah oleh LD itu. Pihak perayu menghujahkan bahawa pihak LD telah melampaui dan melebihi sebahagian fungsi kehakiman apabila ia mengabaikan aduan dan pertuduhan asal oleh Majlis Peguam Malaysia, iaitu 'menipu dan berpakat sulit', dan dengan kemahuan LD sendiri telah mendapati bahawa perayu bersalah atas suatu pertuduhan yang berlainan sama sekali iaitu 'gagal untuk memastikan hakmilik diserahkankan kepada pengadu'. Perayu selanjutnya menghujahkan bahawa dia tidak diberikan peluang untuk menjelaskan situasi sepenuhnya berhubung dengan pertuduhan baharu yang dibuat terhadapnya.

Diputuskan, membenarkan rayuan tanpa perintah berkenaan dengan kos:

(1) Adalah jelas ditunjukkan bahawa kedua-dua pertuduhan yang dihadapkan terhadap perayu adalah berlainan sama sekali antara satu dengan lain. Adalah juga jelas bahawa pihak LD sepatutnya hanya menguruskan aduan menurut kaedah-kaedah yang ditetapkan itu dan tidak boleh mengambil untuk dirinya kuasa yang ia tidak ada. Jika pihak LD merasakan bahawa dapatan oleh JD tidak mencukupi dari segi perincian, pihak LD boleh meminta pihak JD untuk mengemukakan dapatan yang lebih terperinci lagi. Walau bagaimanapun, pihak LD telah melebihi batasannya apabila ia dengan sendiri mengambil langkah mengadakan pertuduhan baharu terhadap perayu, yang bukan merupakan subjek aduan asal. Oleh yang demikian, ia telah bertindak melampaui kuasanya dan atas alasan ini sahaja, rayuan ini sewajarnya dibenarkan (lihat perenggan 46, 48 & 52).

(2) Tindakan oleh LD selepas pihak JD mendapati tidak terdapat apa-apa kes terhadap perayu juga sama dengan pelanggaran kepada kaedah bahawa tidak ada orang yang boleh dipertuduhkan dua kali atas kesalahan yang sama. Walaupun ia boleh dihujahkan bahawa kaedah itu tidak wajar untuk diguna pakai kerana pihak LD telah menuduh dengan pertuduhan baharu, hujah ini cenderung untuk menafikan falsafah sedia ada bahawa tidak ada seorang pun wajar dibicarakan sekali lagi atas fakta

yang sama atau mengalami pendakwaan dua kali (lihat perenggan 53–54).

(3) Adalah suatu yang tidak disangkal bahawa prosiding yang dijalankan di hadapan pihak LD itu bersifat kuasi kehakiman dan oleh kerana ia bersifat kuasi kehakiman, pihak LD hendaklah mematuhi prinsip keadilan asasi. Walau bagaimanapun, pihak LD telah gagal untuk mematuhi prinsip keadilan asasi apabila ia gagal untuk memaklumkan kepada perayu tentang pertuduhan pindaan 'kegagalan untuk memastikan bahawa hakmilik diserahkan kepada pengadu', yang merupakan sesuatu yang perlu bagi membolehkan perayu untuk membela dirinya dengan baik dan menangani kes yang dipertuduhkan ke atasnya (lihat perenggan 2 & 5).]

Notes

For cases on misconduct, see 9 *Mallal's Digest* (5th Ed, 2015) paras 1853–1933.

Cases referred to

A solicitor, Re [1992] 2 All ER 335; [1993] QB 69, QBD (refd)
Datuk M Kayveas & Anor v Bar Council [2013] 5 MLJ 640; [2013] 7 CLJ 533, FC (refd)
Hoo Lin Coln v Wong Weng Woh & Anor [2007] 1 MLJ 56; [2006] 6 AMR 40, HC I(refd)
In The Matter of An Advocate And Solicitor [1978] 2 MLJ 7 (refd)
Ketua Pengarah Kastam v Ho Kwan Seng [1977] 2 MLJ 152, FC (refd)
Lembaga Tatatertib Peguam-Peguam v Hoo Lin Coln & Anor [2008] 4 MLJ 1, FC (refd)

Legislation referred to

Federal Constitution art 7(2)
Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994 r 26(1)
Legal Profession (Practice and Etiquette) Rules 1978
Legal Profession Act 1976 ss 94(3)(k), 99, 103(1), 103D, 103D(3), (4)
National Land Code s 205(3)

Benjamin a/l Sathyanandam (Benjamin & Co) for the appellant.
Lim Hock Chai (PY Ooi Assoc) for the respondent.
Chan Szu Fu (Cheong, De Vries & Co) for the intervener.

Collin Sequerah JC:

INTRODUCTION

[1] This is a case involving a complaint made against an advocate and solicitor ('the appellant/plaintiff') which resulted in an order being made against him by the advocates and solicitors disciplinary board. By way of this originating summons the appellant/plaintiff seeks that his appeal against the whole of the order dated 21 November 2014 under s 103D of the Legal Profession Act 1976 (as amended) where he was found guilty by the advocates and solicitors disciplinary board for conduct unbefitting of an advocate and solicitor and was fined RM10,000 to be paid within one month, be allowed. He also prayed that the said order be set aside, and that the fine of the said sum of RM10,000 paid by him be refunded.

THE PARTIES

[2] The appellant/plaintiff ('the appellant') is an advocate and solicitor practising at the material time in the legal firm of Messrs R Sharmini, Siva Ramiah & Co. The respondent/defendant ('the respondent') was the complainant who lodged a complaint against the appellant by way of letter dated 25 February 2011 with the Bar Council and subsequently the disciplinary board on charges of misconduct. The intervener is the Malaysian Bar Council who was granted the application to intervene in this action on 25 February 2015.

CHRONOLOGY OF EVENTS AND SALIENT FACTS

[3] The brief and salient facts that led to this appeal are as follows. By letter dated 25 February 2011, the respondent lodged a complaint to the Malaysian Bar Council against the appellant who was at all material times practising with the legal firm of Messrs R Sharmni, Siva Ramiah & Co, in respect of a sale and purchase agreement dated 22 July 2005 between the respondent and the vendor namely, Prakash a/l Kalimuthu for a piece of land known as Private Plot No 81 & 82 which is part of Lot No 152, Mukim 20, Seberang Perai Tengah, GM No 516 ('the subsequent agreement') for a purchase price of RM45,000.

[4] The respondent alleged that the appellant had assured her that the transfer of ownership would be concluded in two years. The respondent had paid the said purchase price of the sum of RM45,000 to the vendor through the appellant.

[5] However, after two years, there was no transfer or ownership effected. When the respondent inquired about the matter from the appellant, he was

unhelpful and directed her to deal with the vendor instead. The respondent suspected that the appellant had 'colluded with the vendor to cheat and to procure profit' in the subsequent agreement. As the respondent had not got the land as assured, she wanted the appellant to return the said purchase price.

[6] The appellant admitted that the sum of RM45,000 was paid to his firm as a stakeholder but that the said sum had been paid to the said Prakash, the purchaser in 'the principal agreement' who was the appellant's client. The appellant said that he was not acting for the respondent at all material times.

[7] The complaint was eventually referred to the disciplinary committee ('the DC') for cheating and colluding to procure profit. The DC found no misconduct on the appellant's part in handling the matter and that there was no cause for disciplinary action.

[8] The disciplinary board ('the DB'), however, found that the DC had not made any findings of fact, but merely stated that they found no misconduct and their decision therefore was brief, lacking in details and unsatisfactory. The DB therefore disagreed with the findings of the DC. The DB subsequently issued a notice to the appellant to appear on 12 September 2014 pursuant to s 103D(3) and 103D(4) of the Legal Profession Act 1976 ('the LPA') (as amended) to enable the appellant to make his representation before the DB decided upon the matter.

[9] After considering the appellant's written submission and representation, the DB found the appellant liable for conduct unbefitting of an advocate and solicitor in that he had failed to ensure that title passed to the respondent though the full purchase price was settled, before releasing the purchase price to his client.

[10] As a result, the appellant was fined RM10,000 which was to be paid within one month from the date of the said order by the DB, failing which the appellant shall be suspended pursuant to s 103(1) of the LPA (as amended) from practice as an advocate and solicitor until the penalty was paid. The appellant paid the fine.

SUMMARY OF PARTIES CONTENTIONS

The appellant

[11] The original complaint of the respondent was that 'the Appellant had cheated and colluded to procure profit'. This had been agreed to by the respondent even at this appeal stage as evident from her affidavit. The Malaysian Bar Council however, as the intervener in this matter claimed that

A the main investigation by the DC was for monies paid to the appellant as stakeholder for his client, namely, Prakash as evident from the affidavit filed.

[12] Therefore the appellant submitted as a preliminary point that the DB had erred in finding the appellant guilty of 'failing to ensure that the title passes to the Complainant, who had settled the full purchase price before releasing the purchase price, to his client' when the charge is so obviously different and not similar in nature to the respondent's original complaint.

C **[13]** The appellant submitted that the DC was correct in finding the appellant not guilty of the charge that 'the Appellant had cheated and colluded to procure profit'. It was the DB who had disregarded the original complaint and charge by the Bar Council and on its own volition went on to find guilt on a wholly different charge altogether against the appellant.

D

[14] The DB had therefore gone over and beyond its quasi-judicial function. Its actions were certainly erroneous and at the very least misguided.

E **[15]** The appellant further submitted that the members of the DB without any grounds or reasonable consideration set aside the findings and recommendation of the DC's three member panel who not only heard the oral testimonies of the witnesses but had also reviewed the documentary evidence.

F **[16]** In addition, the DB in its letter dated 8 August 2014 and even at the first or second hearing failed to inform the appellant of its amended charge, ie 'failed to ensure that the title passes to the Complainant'.

[17] The DB's action was therefore tantamount to prosecution of the G appellant. At the first hearing, the DB requested for documentary evidence showing that the appellant did not procure profit and whether the purchase price was forwarded to the vendor but during the second hearing before different panel members, the DB disregarded those documents and immediately found the appellant guilty of conduct unbefitting. The appellant H submitted that there had been a failure of natural justice under the circumstances.

[18] The appellant submitted that as the charge was for 'cheating and I colluding' while the DB's ultra vires charge was 'failing to ensure that title passes', the DB ought to have applied a standard of proof similar to the criminal burden of beyond a reasonable doubt. The DB had not indicated which standard of proof was adopted in coming to their findings.

[19] The appellant further submitted that the DB had misread cl 3(a) of the subsequent agreement. They said that the DB's finding of guilt ie 'conduct unbefitting for failing to ensure title passes' was primarily based on their reading of cl 3(a).

[20] At the second hearing on 21 November 2014, the DB had orally explained that the appellant had failed to adhere to cl 3(a) of the subsequent agreement dated 22 July 2005 between the respondent and Prakash a/l Kalimuthu as follows:

> Borang Pindahmilik 14A dengan borang maklumat duti setem berkenaan tanah tersebut yang ditandatangani keatas nama-nama Pembeli Kemudian/Pemegang Amanah di dalam tempoh 14 hari daripada masa Penjual Kemudian menjual SEMUA plot persendirian dan pindahmilik adalah satu pindahmilik kongsi keatas nama pembeli kemudian/pemegang amanah mengikut syernya masing-masing oleh kerana terikat kepada seksyen 203(5) Kanun Tanah Negara.

[21] The DB explained that since the purchase price had been paid to the vendor, it was the appellant's ('vendor's solicitors') duty in accordance with cl 3(a) to transfer the property to the respondent within 14 days.

[22] The appellant submitted that DB had erred in its interpretation of cl 3(a) and said that the transfer can only take place when all the private plots have been sold. They submitted that the word 'semua' was clear and applicable for transactions of sale and purchase of individual plots and in this case, for all 98 names to be transferred in a single transfer application.

[23] The appellant submitted that the transfer does not take place 14 days from the time the purchase price is paid but 14 days from the time all the plots are sold.

[24] The appellant however during the hearing was not given a chance to explain the following regarding this fact which related to the amended charge:

(a) of the 98 plots which was situated on the three pieces of land, the respondent's plot was on a first grade land and thus it was able to transfer all names as opposed to a lower grade land where it was necessary to nominate a trustee under s 205(3) of the National Land Code. This was not applicable to the respondent; and

(b) since it is a first grade land, therefore it is possible to transfer to the respondent's name but only upon the sale of all the plots.

A **[25]** The appellant submitted that had the appellant been presented with the opportunity to explain the situation and also point out the fact that all plots are required to be sold before the change of name takes place, the DB may have come to a different finding.

B **[26]** The DB further in their letter dated 19 January 2015 stated that the appellant 'had acted in a transaction with unusual terms where the purchase price was paid in advance to his client, the vendor' and also found that 'there were no safeguards to the purchaser'.

C **[27]** The appellant further submitted that he disagreed with the findings of the DB on the grounds that at all material times, the appellant acted for Prakash Kalimuthu and had never acted for the respondent in the subsequent agreement. This fact was agreed to by the respondent during inquiry at the DC, D as well as in her affidavit. This fact had also been accepted by the DB.

[28] As such, the appellant argued that he does not owe any duty of care towards the respondent and there was no requirement by law to safeguard the respondent's interest.

E **[29]** It was submitted that if the appellant did safeguard the respondent's interest, clearly the appellant is liable for other misconduct such as conflict of interest. A solicitor legally could only act for one party in a transaction. It was therefore irresponsible for the DB to come to such a finding.

F **[30]** There was nothing unusual in the terms of the subsequent agreement as it is was a contract agreed to between two parties. The DB had overstepped its boundaries and should not be concerned in deciding the legal status of G agreements or whether it had contained unusual terms or not. Even if the contract was illegal, it was between the parties unless there was evidence to show that the appellant had negligently advised his own client.

[31] It was also submitted that as solicitors of the vendor till the date of H discharge, it was the duty of the appellant to carry out the instructions of his client, ie Prakash Kalimuthu.

[32] It was unfair for the DB to blame it all on the appellant when the I respondent had at all material times was able to appoint a solicitor of their own choice, or lodge a caveat or institute legal proceedings against the said Prakash Kalimuthu. In any case, for refund of purchase price, the purchaser is required to institute legal proceedings and the appellant found it strange that she had opted not to do so but to merely lodge a complaint with the Bar Council.

[33] The appellant submitted that if this appeal was dismissed on the basis that this honourable court agrees with the DB's findings, namely, that a solicitor has to safeguard all parties interests and even their opponent's in all transactions, this would create a dangerous precedent and open the floodgate to all disgruntled litigants.

[34] The DB had also failed to state which section or part of the Legal Profession Act 1976 or Legal Profession (Practice and Etiquette) Rules 1978 or the Rulings of Bar Council which the appellant had supposedly breached. A blanket offence of conduct unbefitting was unacceptable.

The respondent

[35] The respondent alluded to item 8 of the disciplinary committee report dated 30 January 2014, which was the summary on the explanation of the appellant (who was then the respondent) to the complaint of the respondent (who was then the complainant), which stated that the purchase price was received by the appellant/plaintiff as 'stakeholder' and had been paid to the vendor.

[36] The respondent submitted that from this it was obvious that even though the appellant knew about the caveat on the said land in June 2005 (which was before the respondent entered the sale and purchase agreement dated 22 July 2005), the appellant had still handed over the purchase price of RM45,000 to the vendor.

[37] This, the respondent submitted, had clearly supported the said order delivered by the DB, where the grounds for finding the appellant guilty for conduct unbefitting of an advocate and solicitor was that, in summary, he had failed to safeguard or protect the interests of the respondent when he released the full purchase price to the vendor despite being aware that the land was caveated and without ensuring that the title of the land had passed to the respondent.

[38] The respondent submitted that it was evident in cl 3 of the sale and purchase agreement dated 22 July 2015 ('the subsequent agreement') that Messrs R Sharmni, Siva Ramiah & Co, where the appellant practised, were the solicitors for the respondent. It was settled law that when a solicitor holds funds as stakeholder, he or she does not hold it as agent for the vendor nor the agent for the purchaser but holds it as trustee for both pending the outcome of a future event. A breach of a stakeholding term is not just a breach of undertaking but also a breach of trust. The respondent in so contending referred to the case of *Datuk M Kayveas & Anor v Bar Council* [2013] 5 MLJ 640; [2013] 7 CLJ 533 in support.

[39] The appellant had therefore failed to discharge his duty as stakeholder in the said sale and purchase agreement dated 22 July 2015 in which he had failed to ensure that the caveat had been removed and the title of the land had passed to the respondent before releasing the full purchase price of RM45,000, which was issued to his firm and to hold as stakeholder, to the vendor.

[40] In conclusion, the respondent submitted that the DB in finding the appellant guilty for conduct unbefitting of an advocate and solicitor had come to a correct finding due to the appellant's breach of undertaking and/or breach of trust as stakeholder in the said sale and purchase agreement dated 22 July 2015 ('the subsequent agreement').

INTERVENER

[41] The Malaysian Bar Council submitted that the proceedings before the DC and the DB were not to be treated as criminal charges as the appellant had contended and that it was unnecessary to apply the beyond reasonable doubt test as in criminal cases. They submitted also that the DC and the DB were not limited to the complaint brought and it was open to them to venture out of the boundaries of the complaint.

[42] They said that there is no rule or law stating that any reasons have to be given to the appellant to call for a re-hearing. They went on to submit that under r 26(1) of the Legal Profession (Disciplinary Proceedings) (Investigating Tribunal and Disciplinary Committee) Rules 1994, the DC shall state their findings of fact which they had failed to do here. As a result, the DB had called for a re-hearing. In doing so, they were not bound to give any reasons.

[43] The Council finally submitted that the appellant was guilty of misconduct for being in breach of s 94(3)(k) of the Legal Profession Act 1976, specifically ruling 14.10(3) of the rules and rulings of the Bar Council Malaysia as follows:

> Terms of Stakeholding to be strictly adhered to;
>
> A Solicitor acting as Stakeholder for two or more parties must strictly adhere to the terms of the stakeholding al all times. No money or document held by a Solicitor as stakeholder shall be released, utilized, applied or otherwise dealt with by such Solicitor except in accordance with the terms of the stakeholding or with the express written consent of all relevant parties ...

ANALYSIS AND FINDINGS

Issues arising

[44] After considering submissions of parties, the main issues that arise for determination are as follows. Firstly, whether the DB had exceeded its jurisdiction, secondly, whether the DB's actions had exposed the appellant to 'double-jeopardy', thirdly, what is the standard of proof in such proceedings, and fourthly, whether there has been a breach of the dictates of natural justice.

Whether the DB had exceeded its jurisdiction?

[45] The original complaint preferred against the appellant was that he had cheated and colluded to procure profit. The DB however, found the appellant liable as follows:

> The Board found liability on the respondent's (the appellant in this appeal) part for *conduct unbefitting of an Advocate and Solicitor in that he had failed to ensure that the title passes to the Complainant*, who had settled the full purchase price before releasing the purchase price to his client. He had acted in a transaction with unusual terms where the purchase price was to be paid in full advance to his client, the vendor. The purchase price of RM 45,000. was paid through him. There were no safeguards to the purchaser. He released the money in stages to his client although aware the property was caveated. In the end, the purchaser although parting fully with purchase money, got nothing. (Emphasis added.)

[46] It is evident that the two charges levelled against the appellant was totally different in nature from each other. In the case of *Lembaga Tatatertib Peguam-Peguam v Hoo Lin Coln & Anor* [2008] 4 MLJ 1, the apex court speaking through Abdul Aziz Mohamad FCJ held the following:

> [33] That is essentially true. Subsection (1) of s 93 does state in effect that the DB is established for 'the purposes of disciplinary proceedings' under Part VII of the LPA. Subsection (1) of s 94 subjects all advocates and solicitors to the control of the DB, but 'for the purposes of all disciplinary actions'. *It is clear from s 99 that the DB only acts on a complaint that is made or referred to it*, which it is required to deal with in accordance with rules made under Part VII.
>
> [34] *But what may be understood from those provisions to be the function of the DB, of great importance though it undoubtedly is, does not, in my opinion, make the DB the person, to quote the words in the Indian's case again, who 'represents the collective conscience of the standards of professional conduct and etiquette' of advocates and solicitors or 'acts as protector of the purity and dignity of the profession'. The person who meets that description is, in my view, the Bar Council,* which, under sub-s (1) of s 47 of the LPA, is responsible for the proper performance of the functions of the Malaysian Bar, one of whose functions is, under para (b) of sub-s (1) of s 42, 'to maintain and improve the standards of conduct and learning of the legal profession of Malaysia'. In addition, under paras (b) and (c) of s 57, the Bar Council has specific powers 'to answer questions affecting the practice and etiquette of the profession and the conduct of members', 'to take cognizance of matters affecting ... the professional conduct' of members of the Malaysian Bar, and to 'take any action as it considers fit' in relation to 'the interests of the profession'. (Emphasis added.)

[47] It is clear from the above pronouncement that the DB only acts on a complaint that is made or referred to it. Therefore it was not the function of the DB to investigate upon matters and deliberate or decide upon charges unrelated to the compliant. Section 99 of the LPA reads as follows:

> 99 Complaint against advocate and solicitor or pupil
>
> (1) Any complaint concerning the conduct of any advocate and solicitor or of any pupil shall be in writing and shall in the first place be made or referred to the disciplinary board which *shall deal with such complaint in accordance with such rules* as may from time be made under the provisions of this Part. (Emphasis added.)

[48] It is clear that the DB may only deal with complaints in accordance with such rules as prescribed and cannot arrogate to themselves powers they do not have.

[49] This court is needless to say bound by the above pronouncement of the apex court and is constrained to give effect to its decision on this point.

[50] In a somewhat similar vein is the Singapore case of *In The Matter Of An Advocate And Solicitor* [1978] 2 MLJ 7 which held as follows:

> ... by virtue of s 88 of the Legal Profession Act it is the Council of the Law Society that formulates charges against an advocate and solicitor and under s 93(1) of the Act a Disciplinary Committee appointed by the Chief Justice can only investigate matters referred to it by the Council and cannot decide on its own motion to investigate matters not specifically referred to it by the council. Therefore all or any of the matters relating to the receiving and accepting of monies from accident victims other than taxed costs could not properly have been heard by the disciplinary committee and hence were not properly before the court.

[51] In the above case, the Council of Law Society had referred a complaint of payment of monies to a tout for bringing in accident cases. The disciplinary committee however had gone on to investigate the complaint and had brought another charge regarding receiving other than taxed costs from accident victims. In the premises the court found that the order made by the disciplinary committee had vitiated the whole of its findings and rendered them a nullity and of no effect. Although made in the context of the disciplinary committee, this case nonetheless underscores the point that the said body and those similar to it can only investigate and determine complaints emanating from the proper body which in the case above was the Law Society and it was not open to the body to whom the complaint was referred to, to embark upon a course of inquiry which was not the subject of the complaint.

[52] If the DB felt that the findings of the DC was lacking in detail, it was open to them to request the DC to submit more detailed findings. However, it

overstepped its boundaries when it took upon itself the task of effectively preferring fresh charges against the appellant which were not the subject of the original complaint. It had therefore acted ultra vires its powers and on this ground alone, this appeal ought to be allowed.

Whether the DB's actions had exposed the appellant to 'double-jeopardy'?

[53] The action of the DB after the DC had found no case against the appellant is also akin to the infringement of the rule that no man may be prosecuted twice for the same offence. In England, this principle is enshrined in the rule of 'autrefois acquit'. The phrase is French for 'previously acquitted'. The Americans have expressed it as the rule against 'double–jeopardy'. In Malaysia, art 7(2) of the Federal Constitution reads that 'a person who has been acquitted or convicted of an offence shall not be tried again for the same offence ...'. Although the article refers to criminal charges or offences, the underlying rationale and principle is no less applicable here in a situation which involves the livelihood of a professional and the potential repercussions that may ensue from its non-observance.

[54] It could also of course be argued that as the DB had preferred fresh charges, the rule ought not to apply but this argument would tend to ignore the inherent underlying philosophy that no one ought to be tried again upon the same set of facts or suffer double jeopardy based upon the same facts that the first charge was premised upon.

What is the standard of proof in such proceedings?

[55] The contention by the intervener that it was wrong to approach the matter as if it were a prosecution and that it was unnecessary to apply the beyond reasonable doubt test in such proceedings was also unfounded.

[56] In *Re a solicitor* [1992] 2 All ER 335; [1993] QB 69, which concerned the standard of proof to be applied by the Disciplinary Tribunal of the Law Society, Lord Lane CJ, giving the judgment of the court, held as follows:

> It seems to us, if we may respectfully say so, that it is not altogether helpful if the burden of proof is left somewhere undefined between the criminal and the civil standards. We conclude that at least in cases such as the present, where what is alleged is tantamount to a criminal offence, the tribunal should apply the criminal standard of proof, that is to say proof to the point where they feel sure that the charges are proved or, to put it another way, proof beyond reasonable doubt. This would seem to accord with decisions in several of the provinces of Canada. (See [1992] 2 All ER 335 at p 344, [1993] QB 69 at p 81.)

[57] Lord Lane later referred to the provision in the Bar's Code of Conduct requiring the tribunal to apply the criminal standard of proof and observed as follows ([1992] 2 All ER 335 at p 344, [1993] QB 69 at p 82):

> 'it would be anomalous if the two branches of the profession were to apply different standards in their disciplinary proceedings'. This last observation, of course, clearly warranted the Law Society Disciplinary Committee thenceforth applying the criminal standard in all cases rather than merely in those, earlier referred to, 'where what is alleged is tantamount to a criminal offence'.
>
> [22] Their Lordships would add that, even had they concluded that the criminal standard should apply only in disciplinary cases where what is alleged is tantamount to a criminal offence that, at least arguably, would include the present case. This was certainly no mere contractual dispute. The appellant accordingly makes good this first stage of his argument.

Whether there has been a breach of the dictates of natural justice?

[58] The DB had also failed to adhere to the dictates of natural justice when it failed to inform the appellant of the amended charge of 'failing to ensure that the title passes to the Complainant'. This was necessary in order to enable the appellant to properly defend and meet the case alleged against him.

[59] It is beyond dispute that the proceedings conducted before the DB were quasi-judicial in nature. In *Hoo Lin Coln v Wong Weng Woh & Anor* [2007] 1 MLJ 56; [2006] 6 AMR 40, it was held:

> [11] It is submitted that the second respondent's role, as well as the role of the DC, is entirely quasi-judicial. *Black's Law Dictionary* (7th Ed) with Bryan A Garner as the editorial chief at p 1258 defines the phrase 'quasi-judicial' as follows:
>
> > quasi-judicial, adj. Of, relating to, or involving an executive or administrative official's adjudicative acts. Quasi-judical acts, which are valid if there is no abuse of discretion, often determine the fundamental rights of citizens. They are subject to review by courts.
> >
> > Quasi-judicial is a term that is ... not easily definable. In the United States, the phrase often covers judicial decisions taken by an administrative agency — the test is the nature of the tribunal rather than what it is doing. In England quasi-judicial belongs to the administrative category and is used to cover situations where the administrator is bound by the law to observe certain forms and possibly hold a public hearing but where he is a free agent in reaching the final decision. If the rules are broken, the determination may be set aside, but it is not sufficient to show that the administration is biased in favour of a certain policy, or that the evidence points to a different conclusion. '*George Whitecross Paton, A Textbook of Jurisprudence 336* (GW Paton & David P Derham eds 4th ed 1972)'.

[60] And further on it went on to state:

quasi-judicial act. 1. A judicial act performed by an official who is not a judge. 2. An act performed by a judge who is not acting entirely in a judicial capacity ...

[61] Though made in the context involving the DC, there is no basis why the same ought not to apply to a case involving the DB. It is clear beyond peradventure that the acts performed by the DB within the meaning of the LPA is quasi-judicial in nature. Being quasi-judicial in nature, the DB was obliged to observe the dictates of natural justice. In the case of *Ketua Pengarah Kastam v Ho Kwan Seng* [1977] 2 MLJ 152, Raja Azlan Shah FJ (as His Majesty then was) famously said:

> *In my opinion, the rule of natural justice that no man may be condemned unheard should apply to every case where an individual is adversely affected by an administrative action, no matter whether it is labelled 'judicial', 'quasi-judicial', or 'administrative' or whether or not the enabling statute makes provision for a hearing.* But the hearing may take many forms and strict insistence upon an inexorable right to the traditional courtroom procedure can lead to a virtual administrative breakdown. That is because a formal hearing is too slow, too technical and too costly. Lord Shaw's caveat on administrative adjudication that 'judicial methods may ... be entirely unsuitable, and produce delays, expenses, and public and private injury' is too well-known to be side-stepped: see *Local Government Board v Arlidge* [1915] AC 120, p 138. In the last analysis, it depends on the subject-matter. The great need is to deal efficiently and fairly, rather than to preserve all the accoutrements of the courtroom; the considerations of basic fairness are paramount. (Emphasis added.)

[62] Although there are certain limited situations where the rule above stated may not apply, for example, in some cases where the enabling statute does not make such provision, the present situation was not one of them. The DB had therefore erred in not adhering to the dictates of natural justice when it failed to inform the appellant of the amended charges but had proceeded instead to find him guilty and imposed a fine for not carrying out his duties under cl 3(a) of the subsequent agreement which was not the complaint originally brought.

[63] The DB had also misconstrued cl 3(a) of the subsequent agreement in that it was of the view that since the purchase price had been paid to the vendor, it was the appellant's duty in accordance with cl 3(a) to transfer the property to the respondent within 14 days. The appellant was denied the opportunity to explain the true intent and purport of the said cl 3(a). In that respect, there was also a failure here to adhere to the dictates of natural justice.

[64] In the premises, this appeal is therefore allowed. The order of the DB was null and void and is hereby set aside. The fine of the sum of RM10,000 is to be refunded to the appellant. No order is made as to costs.

Appeal allowed with no order as to costs.

Reported by Kohila Nesan